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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. A-333

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO,

Petitioner,

vs.

WESTERN ALFALFA CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. A-333

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,

Petitioner,

VS.

WESTERN ALFALFA CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

Petitioner, Air Pollution Variance Board of the State of Colorado, respectfuly requests that a writ of certiorari issue to review the judgment and opinion of the Colorado Court of Appeals in the case of Air Pollution Variance Board of the State of Colorado v. Western Alfalfa Corporation, Case No. 71-494. The Supreme Court of the State of Colorado refused a writ of certiorari in the case by an Order dated June 25, 1973.

II. OPINIONS BELOW

A. The Opinion of the Colorado Court of Appeals dated April 3, 1973, is attached hereto as Appendix "A". A Petition for rehearing was timely filed and denied by the Colorado Court of Appeals on April 24, 1973.

B. A petition for writ of certiorari was timely filed with the Supreme Court of the State of Colorado which petition was denied by the Supreme Court pursuant to an Order dated June 25, 1973. A copy of that Order is attached hereto as Appendix "B". Mandate was issued by the Colorado Court of Appeals dated June 26, 1973. A copy of that order is attached hereto as Appendix "C".

III. GROUNDS ON WHICH JURISDICTION IS INVOKED

A. The date of the decision of the Colorado Court of Appeals is April 3, 1973. A Petition for Re-Hearing was timely filed with the Colorado Court of Appeals, which petition was denied on April 24, 1973. A Petition for Writ of Certiorari to the Supreme Court of the State of Colorado was timely filed and denied by that court on June 25, 1973. The mandate of the Court of Appeals of the State of Colorado was issued on June 26, 1973.

B. The statutory provision concerning jurisdiction of this court to review the decision of the state court by writ of certiorari is Title 28, U.S. Code, Section 1257.

C. A judgment of an inferior state court may be reviewed where a writ of error to the highest court of the

state has been denied. *Bacon v. Texas*, 163 U.S. 207, 41 L.Ed. 132 (1896).

IV. QUESTIONS PRESENTED FOR REVIEW

A. Does failure to notify an industrial pollutor of a Ringelmann or opacity reading at the time the reading is taken or prior to the reading violate the provision of the Fourth Amendment to the United States Constitution?

B. Is it necessary to obtain the consent of an industrial polluter prior to taking a Ringelmann or opacity reading from the premises of the particular industry, and if the consent is not obtained, is the taking of the Ringelmann or opacity reading a sufficient invasion of the right of privacy of the industry to constitute a violation of the Fourth Amendment to the United States Constitution?

C. Where inspections and the taking of opacity and Ringelmann readings are necessary to further urgent federal and state interests to protect the environment pursuant to federal and state law, is the possibility of abuse and the threat to privacy of such dimension that the taking of a Ringelmann or opacity reading without a warrant or consent a violation of the Fourth Amendment to the United States Constitution?

V. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Article IV of the Amendments to the Constitution of the United States provides that:

> "That right of the people to be secure in their persons, houses, papers and effects against unreasonable

searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

B. The Air Pollution Control Act of the State of Colorado which was in effect at the time of this case (a copy of which is attached hereto as Appendix "D").

C. The federal Clean Air Act, as amended, 42 U.S.C., Section 1857, et. seq.

VI. STATEMENT OF THE CASE

Respondent, Western Alfalfa Corporation, was issued a Cease and Desist Order on June 16, 1969 from the Division of Administration of the Colorado Department of Health advising them that the emissions from three (3) of their plants in northern Colorado were not in compliance with the Air Pollution Control Act. Western Alfalfa Corporation requested a hearing before the Air Pollution Variance Board of the State of Colorado for a determination of whether they were in fact in violation of the emission standards.

The Board held a hearing in September of 1969. At the conclusion of the hearing, the Board took the matter under advisement and then entered a Decision on January 31, 1970 holding that Western's emissions were, in fact, in violation of the Emission Standards in effect at that time. A copy of that decision is attached hereto as Appendix "E".

The Ringelmann and opacity readings that were taken

by the inspector for the division, were taken from a position on the premises of Western Alfalfa Corporation. The trial court reversed the decision of the Board. A copy of the Trial Court's decision is attached hereto as Appendix "F". The Court of Appeals affirmed the decision of the trial court.

VII. GROUNDS AND REASONS FOR GRANTING WRIT OF CERTIORARI

The Colorado Court of Appeals stated in its Decision that:

> "In the instant casse, the evidence that resulted in issuance of the Ceasse and Desist Order was gathered by a field inspector from the Division, who entered the premises of Wesstern on June 4, 1969, without the knowledge or consemt of anyone from Western, and made his readings. It was not until Western received the Cease and Desisst Order that it was aware of the fact that someone had been on its premises collecting evidence for a case against it. This fact convinces us that the hearing afforded Western lacked the fundamental elementts of due process of law, since the secret nature of the investigation foreclosed Western from putting on anyy rebuttal evidence.
>
> We conclude that the act of conducting tests on the premises of Western without either a warrant or the consent of anyone from Western, constituted an unreasonable search. *Camera v. Municipal Court,* 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930.
>
> *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943. In *Camara,* the Supreme Court made it clear that searchees by administrative agencies must be reasonable and must either be based upon the con-

sent of the person who owns the premises, or must be pursuant to a warrant. It was further made clear that this rule is not confined to criminal prosecutions. On the facts of this case, it was necessary for the field investigator to comply with this requirement.—

Since violations of the act can be based upon emissions aggregating three (3) minutes or more during any hour, 1967 Perm. Supp., C.R.S. 1963, 66-29-5(a), and since the evidence by its very nature is continually dissipating, we conclude that it is constitutionally mandatory in this type of case that the party accused be aware of the taking of tests and measurements on its premises at the time they are made."

Emissions of the type being emitted by Western Alfalfa can be observed either on or off the premises of the Respondent and require that a violator be notified either prior to or at the time of taking an opacity or Ringelmann reading. Ringelmann and opacity readings are taken pursuant to statutory provisions for the protection of the public health, welfare and safety. The purpose of the Fourth Amendment to the Constitution of the United States is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. No invasion of privacy or security of an individual is involved when an inspector simply takes an opacity or Ringelmann reading of an emission being emitted by an air pollution violator for all the world to see. This court in the *Camara* and *See* cases was concerned about an unauthorized and unwarrented inspection of a condition which could not be easily and quickly changed. Therefore the obtaining of a warrant with a neutral magistrate setting out the limits and extent of such a search would not hamper the effective enforcement of the law in question.

In the recent case of *United States v. Biswell*, 406 U.S. 311, 32 L.Ed.2d. 87, 92 S.Ct._____ (1972) this court held that a search of a firearms dealer's storage area under the provision of a statute which authorized official entry during business hours into

> "the premises of any firearms or ammunition — dealer — for the purpose of inspecting or examining (1) any records or documents required to be kept — and (2) any firearms or ammunition kept or stored by such — dealer — at such premises"

without a warrant did not constitute a violation of the Fourth Amendment to the United States Constitution. The United States Supreme Court approved the search and seizure in the *Biswell* case, *supra.*, on the basis that:

1. The search and seizure was not accomplished by an unauthorized force (page 91 of opinion).

2. The legality of the search depended not on consent but on the authority of a valid statute (page 92 of opinion).

3. The search and seizure was important in the *federal effort* to prevent violent crime and to assist *states* in regulating the fire arms traffic within their borders (page 92 of opinion) (emphasis supplied)

4. If inspections were to be effective and serve as a credible deterrent, unannounced even frequent inspections were necessary (page 92 of opinion).

5. Inspections pose only limited threats to the dealer's justifiable expectations of privacy (page 92 of opinion).

6. Regulatory inspections further urgent federal interest and the possibilities of abuse and threat to privacy are not of impressive dimensions (page 93 of opinion).

In *United States v. Hofbrauhaus of Hartford* (D.C. Conn.) 313 Fed. Supp. 544, 548 (1970) the court noted that under a statutory inspection scheme, if the limits and purpose of inspection were defined so that they contain a standard of reasonablenes nothing would be served by compelling individualized review by a magistrate. The assumption is that operators in highly regulated areas are advised of the governing law.

In the case of Western Alfalfa the enforcement officials for the Air Pollution Control Act were proceeding under a federal and state statutory scheme for inspection of a regulated industry to protect the public health, welfare and safety of the citizens of the state from pollution. A Ringelmann test is not a search of property, persons, or conditions secreted away behind walls or enclosed within a building, it is a determination of the opacity of a plume of smoke which the inspected business is issuing forth for the whole world to see. Under the decision of the Colorado Court of Appeals it would appear that a air pollution violator would have to be notified if a Ringelmann or opacity reading is being taken off of his premises as well as on his premises or it would constitute a violation of the Fourth Amendment.

In *United States v. Del Campo Baking Mfg. Co.* D.C. Del.,) 345 Fed. Supp. 1371 (1972) the Petitioners, attempting to rely upon *Camara* and *See, supra,* argued that a warrantless code enforcement inspection violates the Fourth Amendment unless not mere consent but a knowing and voluntary consent is given to an administrative

search. The Court responded that the case was governed by *Biswell, supra,* and that under the *Biswell* case since a search based upon a statutory scheme of regulation depends not upon consent but upon the statute, the fact that permission is granted in ignorance of the Fourth Amendment proscription against unreasonable search and seizure is a fact which is irrelevant (at Page 1376).

It appears that the Colorado Court of Appeals may have been more concerned about notice being given to Western Alfalfa than a violation of the Fourth Amendment to the United States Constitution. A notice problem would appear to be more of a discovery issue and there is no question that Western received a notice of the violation in ample time prior to the hearing before the Air Pollution Variance Board.

If it is necessary to notify a potential violator of the Air Pollution laws prior to taking an opacity or Ringelmann reading, the pollutor has the potential of thwarting the effectiveness of the enforcement of the law by reducing the capacity or input of his plant during the taking of the Ringelmann or opacity reading. In the case of violations of the open burning regulation, the potential violator could simply refuse access to his premises, set fire to the material which he desires to burn, and the Western Alfalfa decision would preclude an investigator from testifying as to what he observed in court in order to enforce the Air Pollution Control Act.

The Western case is distinguishable from the *See* and *Camara* cases, *supra,* on the following basis:

1. No criminal prosecution is involved in the Western case.

2. The violation in question is of the type that is

strictly controlled by federal and state statute in order to protect the public health, welfare and safety.

3. The federal and state statutes' standards provide that it is a violation of the law if the emissions exceed the standards for a period of three minutes, therefore, this is the type of a violation which must be noted and recorded during a very short period of time, whereas in the *See* and *Camara* cases the violations were of the type that could not be changed or concealed easily.

4. A minimum, if any, invasion of privacy is involved in taking a Ringelmann or opacity reading.

VIII. CONCLUSION

It is respectfully submitted that the Ringelmann and opacity readings taken in the Western Case were necessary to further an urgent federal and state interest and the possibility of abuse and the threat to privacy are not of impressive dimensions in an inspector simply reading the density of an emission which is obvious and can be seen from either on or off the premises. The Western case falls more within the purview of the *Biswell* case, *supra,* and subsequent decisions by this court set out herein. The Ringelmann and opacity readings were taken pursuant to federal and state statutory scheme and no consent or warrant is necessary prior to the taking of such a Ringelmann and opacity reading.

Respectfully submitted,

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APPENDIX A

COLORADO COURT OF APPEALS

NO. 71-494

COURT OF APPEALS
STATE OF COLORADO

Opinion filed and judgment entered on the 3rd day of April, 1973. John Clarence Seifert, Clerk of the Court.

WESTERN ALFALFA CORPORATION,
a Kansas corporation,

Petitioner-Appellee,

vs.

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,

Respondent-Appellant.

Appeal from District Court, Weld County
Honorable Donald A. Carpenter, Judge

DIVISION II JUDGMENT AFFIRMED

Silverstein, C.J., Dwyer and Pierce, JJ.

Linde, Thomson, Van Dyke, Fairchild & Langworthy, George D. Blackwood, Kansas City, Missouri; Houtchens, Houtchens & Dooley, S. Robert Houtchens, Greeley, Colorado; Lee, Bryans, Kelly & Stansfield, Donald D. Cawelti, Denver, Colorado; Attorneys for the Petitioner-Appellee.

Duke W. Dunbar, Attorney General; William Tucker, Assistant Attorney General, Denver, Colorado; Attorneys for the Respondent-Appellant.

Opinion by JUDGE PIERCE.

Appendix A-2

On June 16, 1969, Western Alfalfa Corporation received a cease and desist order from the Division of Administration of the Colorado Department of Health (Division) advising them that the emissions from three of their plants in Northern Colorado were not in compliance with the Air Pollution Control Act (Act), and ordering them, pursuant to the provisions of 1967 Perm. Supp., C.R.S. 1963, 66-29-10(3), to cease and desist from any further violations of the Act. Within ten days from receipt of the cease and desist order, Western filed with the Air Pollution Variance Board (Board) a denial that it was in violation of the Act.

The Board held a hearing in September of 1969. At this hearing, a witness for the State testified that he had made observations on the premises of Western on June 4, 1969, from which he concluded that Western was in violation of the Act. The readings taken purportedly registered darker in shade than a No. 2 on the Ringlemann chart, contrary to the terms of 1967 Perm. Supp., C.R.S. 1963, 66-29-5.

The Ringlemann chart is an instrument, assigning numerical values to various gradations of smoke color as they appear on the chart. A party using the chart matches the color and density of the alleged smoke pollutant under observation with the numbered example on the chart. This test is sanctioned by the Act as the minimum valid method of determining whether or not the Act is being violated, and is presumptively valid. *Fray Roofing Co. v. State Department of Health,* _____ Colo. _____, 499 P.2d 1176. This method of measuring air pollution is generally sanctioned. *See City of Portland v. Fry Roofing Co.,* 3 Ore. App. 352, 472 P.2d 826 for a collection of cases approving the Ringelmann chart.

Western countered this evidence with Ringelmann readings taken approximately one year earlier by a consulting engineer hired by Western, which showed no violation. They also offered the results of a sophisticated test conducted at their plant by an independent engineering firm some months after they were issued the cease and desist order. Western contends that this test established that they were not in violation of the Act.

The Board concluded that Western's operations were in violation of the Act. It further determined that it would not accept the report of the independent engineering firm because the method of testing was not acceptable to the Division as required by the statute. 1969 Perm. Supp., C.R.S. 1963, 66-29-5(2)(e).

Thereafter, Western filed suit in the district court pursuant to the terms of 1967 Perm. Supp., C.R.S. 1963, 66-29-13, seeking to have the cease and desist order set aside as not being in compliance with the law. The trial court reversed the Board. We affirm the conclusion and judgment of the trial court.

The Act, as it then existed,[1] established the approach that the Division was to use in searching out and stopping violations. Specially, the Division had the duty to determine, by means of field studies and air samples, the ambient air standard in any area in the state. 1967 Perm. Supp., C.R.S. 1963, 66-29-8. This included the authority to enter and inspect any property for the purpose of investigating either an actual or a suspected source of air pollution. 1967 Perm. Supp., C.R.S. 1963, 66-29-8(2)(d).

[1] The statute presented to us for construction has been repealed in its entirety, and re-enacted as the Air Pollution Control Act. 1971 Perm. Supp., C.R.S. 1963, 66-31-1 et seq. The new Act has been upheld from a constitutional attack in **Fry Roofing Co. v. State Department of Health**, _____ Colo. _____, 499 P.2d 1176.

In the instant case, the evidence that resulted in issuance of the cease and desist order was gathered by a field inspector from the Division, who entered the premises of Western on June 4, 1969, without the knowledge or consent of anyone from Western, and made his readings. It was not until Western received the cease and desist order that it was aware of the fact that someone had been on its premises collecting evidence for a case against it. This fact convinces us that the hearing afforded Western lacked the fundamental elements of due process of law, since the secret nature of the investigation foreclosed Western from putting on any rebuttal evidence.

We conclude that the act of conducting tests on the premises of Western without either a warrant or the consent of anyone from Western, constituted an unreasonable search. *Camara v. Municipal Court,* 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930; *See v. City of Seattle,* 387 U.S. 541, 87 S.Ct. 1737, 18 L. Ed. 2d 943. In *Camara,* the Supreme Court made it clear that searches by administrative agencies must be reasonable and must either be based upon the consent of the person who owns the premises, or must be pursuant to a warrant. It was further made clear that this rule is not confined to criminal prosecutions. On the facts of this case, it was necessary for the field investigator to comply with this requirement. We note that this provision was added to the Act by an amendment subsequent to the events in question. 1969 Perm. Supp., C.R.S. 1963, 66-29-8(2)(d).

Western could not effectively rebut the evidence against it since it had no representative present at the time the test was administered, nor did it have any knowledge of the nature of its emissions on the date in question.

This is particularly important since the Board made it very clear that the only evidence which was probative of whether Western was in violation of the Act was evidence which would rebut the evidence of the alleged violation on June 4, 1969. Since violations of the Act can be based upon emissions aggregating three minutes or more during any hour, 1967 Perm. Supp., C.R.S. 1963, 66-29-5(a), and since the evidence by its very nature is continually dissipating, we conclude that it is constitutionally mandatory in this type of case that the party accused be aware of the taking of test and measurements on its premises at the time they are made.

Had Western known of the field observer being on its premises on the date of the investigation, it would have had a reasonable opportunity to effectively exercise its rights of confrontation at the hearing before the Board. 1969 Perm. Supp., C.R.S. 1963, 3-16-4. Imposition of the *Camara* rule assures fundamental fairness in this type of situation. The failure to provide this protection resulted in a violation, in this case, of the Fourth Amendment to the United States Constitution.

Judgment affirmed.
CHIEF JUDGE SILVERSTEIN and
JUDGE DWYER CONCUR.

APPENDIX B

SUPREME COURT

Clerk's Office, State of Colorado, Denver 80203

Case No. C-382

June 25, 1973

71-494

Air Pollution Variance Board

v.

Western Alfalfa Corp.

Copy of an order entered in the above numbered and titled case June 25, 1973, is enclosed.

Your very truly,
RICHARD D. TURELLI, Clerk
By Judi Malora, Deputy

cc:

Mr. John Seifert, Clerk, Colorado Court of Appeals, 607 State Social Services Bldg., Denver, Co. 80203

Honorable John P. Moore, Attorney General, Mr. Wliliam Tucker, Assistant Attorney General, State Capitol, Denver, Co. 80203

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Houtchens, Houtchens & Dooley, 1007 9th Ave., Greeley, Co. 80631

Appendix B-2

IN THE SUPREME COURT OF THE
STATE OF COLORADO

Case No. C-382

April Term, 1973

AIR POLLUTION VARIANCE BOARD
OF THE STATE OF COLORADO,

Petitioner,

vs.

WESTERN ALFALFA CORPORATION,
a Kansas corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals.

After review of the record, the briefs and the opinion of the Court of Appeals,

IT IS ORDERED by this court that said petition be, and the same hereby is, denied.
June 25, 1973

By the Supreme Court
Sitting En Banc

SUPREME COURT
State of Colorado

Certified to be a full, true and correct copy
June 25, 1973

Court Seal

RICHARD D. TURELLI,
Clerk of the Supreme Court
By Judi Malora,
Deputy Clerk

APPENDIX C

COURT OF APPEALS

State of Colorado, 1575 Sherman Street
Denver, Colorado 80203 (303) 892-2641

OPINION OF THE COLORADO COURT OF APPEALS ANNOUNCED AND JUDGMENT ENTERED, April 3, 1973.

Oral Arguments held, January 30, 1973.
Before Harry S. Silverstein, Jr., Chief Judge, William F. Dwyer and Charles D. Pierce, Judges.

MANDATE

No. 71-494

Tr. Ct. No. 19974

WESTERN ALFALFA CORPORATION,
a Kansas corporation,

Petitioner-Appellee,

vs.

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO,

Respondent-Appellant.

This cause came on to be heard on the record on appeal from the District Court of the County of Weld, and was argued by counsel, on consideration whereof, it is

ordered that the judgment of said Court is AFFIRMED.

JOHN CLARENCE SEIFERT,
Clerk of the Court.
ANNA MAE TOMSIC,
Deputy

Court Seal

COURT OF APPEALS
STATE OF COLORADO

Certified to be a full, true and correct copy

Date June 26, 1973

John Clarence Seifert, Clerk of Court of Appeals
By Anna Mae Tomsic, Deputy Clerk

APPRENDIX D

(Reproduced by the Colorado State Department of Public Health)

AIR POLLUTION CONTROL ACT AMENDING THE "AIR POLLUTION CONTROL ACT".

1967 Amendments and Changes to Chapter 45, Colorado Session Laws 1966.

(*Denotes Changes)

66-29-1

Section 1. — SHORT TITLE. — This act shall be known and may be cited as the "Air Pollution Control Act."

66-29-2

Section 2. — LEGISLATIVE DECLARATION. — It is hereby declared to be the policy of the state of Colorado to maintain a reasonable degree of purity of the air resources of the state, which shall be consistent with the public health, welfare, and public enjoyment thereof, the industrial development of the state, the propagation and protection of human, plant, and animal life, and the protection of physical property and other resources. To that end it is the purpose of this act to require the use of all available practical methods to reduce, prevent, and control air pollution in the state of Colorado and to maintain a cooperative program between the state and local units of government. It is further declared that the prevention, abatement, and control of air pollution in this state are affected with a public interest and that the provisions of this act are enacted in the exercise of the police powers of

this state for the purpose of protecting the health, peace, safty, and general welfare of the people of this state. 66-29-3

Section 3. — DEFINITIONS. — (1) When used in this act, the following words and phrases shall have the meanings ascribed to them in this section:

(2) "Air pollution variance board" means the air pollution variance board created by section 7 of this act.

(3) "Division" means the division of administration of the state department of public health.

(4) "Person" means any individual, public or private corporation, partnership, association, firm, trust, estate, the state or any department, institution, or agency thereof, any municipal corporation, county, city and county, or other political subdivision of the state, or any other legal entity whatsoever which is recognized by law as the subject of rights and duties.

(5) "Air contaminant" means a dust, fume, gas, mist, smoke, vapor (other than water vapor alone), pollen, or any combination thereof.

(6) "Air pollution" means the presence in the atmosphere of one or more air contaminants in quantities, of characteristics, and of a duration throughout the state or throughout such areas of the state as shall be affected thereby, which are injurious to human, plant, or animal life or to property, or which unreasonably interfere with the comfortable enjoyment thereof.

(7) "Air contamination" or "emission" means the discharge into the atmosphere of one or more air contaminants which contribute to a condition of air pollution.

(8) "Air contamination source" means any source whatsoever at, from, or by reason of which there is emitted or discharged into the atmosphere any air contaminant.

(9) "Ambient air" is the surrounding or outside air.

(10) "Air cleaning device" means any method, process, or equipment which removes, reduces, or renders less noxious air contaminants discharged into the atmosphere.

(11) "Area of the state" means any geographical area of the state that may be so designated by the division, as provided in section 8 (1) (c) of this act.

(12) "Gas" means a formless fluid which occupies space and which can be changed to a liquid or solid state only by increasing pressure with decreased or controlled temperature, or by decreased temperature with increased or controlled pressure.

(13) "Ringelmann" means the method of estimating smoke density described in U.S. bureau of mines information circular 7718, dated August 1955, by means of the Ringelmann chart.

(14) "Air pollution control authority" means any person or agency given authority by the division or by a local governmental unit with respect to air pollution control.

(15) "Local air pollution law" means any law, ordinance, resolution, code, rule, or regulation adopted by the governing body of any home rule city, city of the second

class, town, county, or city and county pertaining to the prevention, control, and abatement of air pollution, including, but not limited to, the adoption of emission standards such as set forth in section 5 of this act.

66-29-4

Section 4 — AMBIENT AIR STANDARDS. — (1) The following standards of ambient air quality define the limits of air contamination by particulates and gases above which limits the ambient air is hereby declared to be unacceptable:

(2)(a) Kind of particulate	Measurable limits averaged for any three-month period
Suspended particulates	120 micrograms per cubic meter
Coefficient of haze	0.5 Coh units

(b)(i) Sampling stations shall be so located and operated as to conform as nearly as possible to the following criteria:

*(ii) Located in the central business district of a city or community and at such other places as the division determines desirable, approximately twenty-five to fifty feet above ground level and where the air being sampled is representative of the ambient air.

(ii) Samples to be collected on a regular three-day basis.

(3)(a) Gases .....
Measurable limits based on one per cent of the time during any three-month period

Total oxidant .....
.1 part per million for one hour using a potassium iodide method of testing

Oxides of nitrogen .....
.1 part per million for one hour

Sulfur Dioxide .....
.5 parts per million for one hour — or —
.1 part per million for twenty-four hours

(b) Sites and conditions of gas sampling shall be so chosen as to realistically represent the exposures of persons and property which might be affected.

66-29-5

Section 5. — EMISSION STANDARDS IN DESIGNATED AREAS OF THE STATE. — (1) Subject to such variances as may be granted pursuant to section 11 of this act, the emission standards set forth in subsections (2) through (6) of this section shall be in full force and effect in each area of the state designated by the division pursuant to section 8 (1) (c) of this act, immediately upon such designation.

(2)(a) No person shall discharge, or cause or permit to be discharged, into the atmosphere, from any single source of emission, any air contaminant for a period aggregating more than three minutes during any hour which is:

(b) As dark or darker in shade as that designated

as No. 2 on the Ringelmann chart, as defined in section 3 of this act; or

(c) of opacity equal to or greater than smoke described in paragraph (b) of this subsection; or

(d) Of any share or opacity greater than that specified in paragraphs (b) or (c) of this subsection and designated under any other nationally accepted measuring system which is comparable to the Ringelmann method.

(3) No person shall permit solid matter in combustion gas from any fuel-burning equipment in excess of 0.85 pounds per one thousand pounds of such gas, adjusted to twelve per cent carbon dioxide, or solid particulates in any other gas in excess of 0.85 pounds per one thousand pounds of undiluted gas, to escape into the atmosphere or to pass any convenient measuring point in a chimney, breeeching system, or other discharge system.

(4)(a) No person shall burn or permit to be burned on any open premises owned or controlled by him, or on any public street, alley, or other land adjacent to such premises, any rubbish, waste paper, wood, or other flammable material, unless a permit therefor shall first have been obtained from the appropriate authority enforcing air pollution control standards. In granting or denying the issuance of any such permit, said authority shall base its action on the location and proximity of such burning to any building or other structure, the potential contribution of such burning to air pollution in the area when the same may violate any standard in this section, climatic conditions on the day or days of such burning, and compliance by the applicant for the permit with applicable

fire protection and safety requirements of the local authority or area.

(b)(i) This subsection shall not apply to:

(ii) Burning in the course of any agricultural operation in the growing of crops;

(iii) Fires used for noncommercial cooking of food for human beings or for instructural or recreational purposes;

(iv) Incinceration of paper and other trash or residential premises by the owner or occupant thereof;

(v) Smokeless flares or safety flares for the combustion of waste gases; or

vi) Flares used to indicate some danger to the public.

*(c) On and after January 1, 1970, no person shall burn any combustible refuse in any incinerator except in an approved multiple-chamber incinerator or in equipment found by the division in advance of such use to be equally effective for the purpose of air pollution control as an approved multiple-chamber incinerator. No person shall operate, or cause to be operated, any incinerator in such manner as to create emissions which violate any provision of this section.

(5)(a)(i) Any storage, holding, stationary tank, reservoir, or other container having a capacity of forty thousand or more gallons, constructed on or after the effective date of this act and used for gasoline or any petroleum distillate having a vapor pressure of one and

one-half pounds per square inch absolute, or greater, under actual storage conditions, shall be designed and equipped with one of the following vapor loss control devices, properly installed, in good working order, and in operation.

(ii) A floating roof consisting of a pontoon type or doublt-deck type roof, resting on the surface of the liquid contents and equipped with a closure seal, or seals, to close the space between the roof edge and tank wall. The control equipment provided for in this paragraph shall not be used if the gasoline or petroleum distillate has a vapor pressure of eleven pounds per square inch absolute, or greater, under actual storage conditions. All tank gauging and sampling devices shall be gas-tight except when gauging or sampling is taking place.

(iii) A vapor balloon, or vapor dome, designed in accordance with accepted standards of the petroleum industry.

(iv) Other equipment of equal efficiency; provided, that plans therefore are submitted to and approved by the appropriate air pollution control authority.

(b) Propane or butane, and similar products, shall be stored in pressure tanks maintaining working pressures sufficient at all times to prevent hydrocarbon vapors or gas loss to the atmosphere, or at refrigerated low temperature, or in low pressure storage equipped with vapor collection and compression equipment designed to prevent loss of hydrocarbon vapor or gas to the atmosphere.

(c) Any petroleum storeg tank, other than those covered by paragraph (b) of this subsection, which is con-

structed or extensively remodeled on or after the effective date of this act shall be equipped with a submerged filling device.

(d) All facilities for dock loading of petroleum products, other than those pertaining to products covered by paragraph (b) of this subsection, which are in existence or constructed on or after the effective date of this act, having a vapor pressure of one and one-half pounds per square inch absolute, or greater, at loading temperature shall provide for submerged filling.

(6)(a) No person shall cause or permit any emission of sulphur dioxide which results in average ground-level concentrations of sulphur dioxide at any given point in excess of one part per million, based on volume, of surphur dioxide in a twenty-minute period of any hour and average exposure shall not exceed three-tenths parts per million, based on volume, in any eight-hour period. Such limitations shall not apply to ground-level concentrations occurring on the property from which emission occurs; provided, that such property, from the point of emission to the point of any concentration, is controlled by the person responsible for such emission.

(b) Except as provided in subsection (6)(a) of this section, no person shall cause or permit the emission of gas containing sulphur dioxide in excess of two thousand parts per million, based on volume. All sampling of exhaust gases shall be conducted following techniques designated by the appropriate air pollution control authority. For the purposes of this paragraph, all sulphur present in gaseous compounds containing oxygen shall be deemed to be present as sulphur dioxide, and analyses of samples taken to determine the amount of sulphur dioxide in ex-

haust gases shall be made as specified by the air pollution control authority. Tests for determining compliance with this paragraph shall be for at least fifteen consecutive minutes or ninety per cent of the time of actual source operation whichever is less.

(c)(i) Emissions in excess of the limits specified in paragraph (b) of this subsection shall not constitute a violation of this subsection so long as the requirements of paragraph (a) of this subsection and the following conditions are met:

(ii) Any person intending to operate under the provisions of this paragraph (c) shall so notify the air pollution control authority in writing prior to such emission.

(iii) Any person operating pursuant to this paragraph (c) shall provide for at least three recording sulphur dioxide monitoring stations, properly located, as well as a recording meteorological station equipped to record wind speed and direction.

(iv) All reports of data obtained from such instruments shall be furnished to the air pollution control authority at the end of each month. Whenever such data indicate any emission in excess of the limits specified in paragraph (a) of this subsection, said person shall furnish the air pollution control authority evidence that proper action has been taken to reduce or prevent further such excess emissions.

66-29-6

Section 6. — LOCAL GOVERNMENT — AUTHORITY. — (1) Home rule cities, cities of the second class, towns, counties, and cities and counties are hereby authorized to enact local air pollution laws. Every such law shall

provide for variances, hearings, judicial review and injunctions consistent with sections 11, 12, 13, and 14 of this act and may include standards which are the same as or more restrictive than the standards set forth in this act; provided, nothing herein contained shall prohibit any such local law from controlling any air contamination or air contamination source which is not subject to control under the provisions of this act.

(2) All local air pollution laws and orders issued pursuant thereto in existence at the time this act takes effect are hereby validated as though adopted pursuant to the authority of section 6 (1); provided, if any such local law or order fails to meet the requirements of this act, the governing body under whose authority such law or order was promulgated shall have until July 1, 1966, to amend, modify, or repeal the same so that it will meet the requirements of this act, but if not so amended, modified, or repealed, the same shall be superseded by this act.

(3) To the extent a local air pollution law adopted by a county is more restrictive than such a law adopted by any city or town within such county, the county law shall apply in lieu of the city or town law to the extent of the inconsistency.

(4) Application, operation, and enforcement of valid local air pollution laws shall be completely independent of but may be concurrent with the application, operation, and enforcement of this act. The appointment of an air pollution control authority by the division shall in no way affect the duties and responsibilities given the same person or agency under a local air pollution law, and the appointment of an air pollution control authority by a local governmental unit shall in no way affect the duties and

responsibilities given the same person or agency by the division.

(5) Any local governmental authority enforcing air pollution control standards which shall issue any enforcement order or grant any variance shall, at the time of such issuance or granting, transmit to the division a copy of such order or variance. Within one hundred twenty days after the effective date of this act, any local governmental authority having adopted a local air pollution law prior to such date, shall transmit to the division a report setting forth sufficient information concerning any and all enforcement orders or variances, or both, issued or granted prior to the effective date of this act.

*(6) In order to assure coordination of efforts to control and abate air pollution, at least semiannually the division and each air pollution control authority created by a local air pollution law shall confer and review each other's records concerning the area subject to such local law and coordinate their respective plans and programs for such area.

66-29-7

Section 7.—AIR POLLUTION VARIANCE BOARD. — (1)(a) There is hereby created, as a division of the state department of public health, an air pollution variance board which shall consist of nine members appointed by the governor, except as provided in paragraph (b)(i) of this subsection:

(b)(i) The nine members of said air pollution variance board shall be:

(ii) One member designated by the state board of health, to represent said board in matters of air pollution

in the interests of the public health of the people of the state.

(iii) One member shall be a registered professional engineer with at least five years' experience in the actual practice of his profession and who is not from industry.

(iv) One member, who is not from industry, shall be either a physician licensed to practice in this state or a toxicologist.

(v) Three members from industry in this state.

(vi) Three members, as representatives of the public at large, not from industry.

(c) Members of such variance board appointed by the governor shall hold office for terms of four years and until their successors are selected and qualified, except that of the appointments first made by the governor, four shall be for terms of two years each, as designated by the governor at the time of appointment. The member designated by the state board of health shall serve at the discretion of the state board of health. There shall be no limitation on the number of terms any appointed member may serve. The members of the air pollution variance board shall be appointed within thirty days after the date of the approval of this act. If any member of the air pollution variance board appointed by the governor shall resign or be removed from the air pollution variance board, the governor shall promptly appoint a new member subject to the provisions of this act, to fill the vacancy for the remainder of the term of the member of the air pollution variance board who has ceased to be a member thereof. The governor may remove for cause any member of the air pollution variance board appointed by him.

(2)(a) The member of the air pollution variance board designated by the state board of health shall be the chairman of such variance board for the first year after the creation thereof, and thereafter the said variance board shall elect its chairman annually from its members for a term of one year or to fill a vacancy.

(b) The air pollution variance board shall meet at least quarterly, keep a record of its proceedings, and determine the rules of its own procedures.

(c) Special meetings of the air pollution variance board may be called by its chairman upon his own initiative and shall be called by him upon the receipt by him of a written request therefor signed by two or more members of said variance board or by the division.

(d) Five members of the air pollution variance board shall constitute a quorum, and the concurrence of at least a majority of all members of the air pollution variance board in many matter within its powers and duties shall be required for any determination made by the said variance board.

(e) At least three days prior to each meeting, written notice shall be given to each member of the air pollation variance board of the time, place and purpose of such meeting.

(3) Each member of the air pollution variance board shall receive a per diem of twenty dollars for each day actually spent in the discharge of official duties, not to exceed twelve hundrd dollars in any one year; and shall shall be reimbursed for necessary and actual expenses which he shall incur in the performance of his duties under this act.

(4)(a) The air pollution variance board shall have the duty to:

(b) Grant variances as provided in section 11 of this act.

(c) On or before December 1 of each year, report to the members of the general assembly on the effectiveness of the provisions of this act in carrying out the legislative intent as declared in section 2 of this act, and include in such report such recommendations at it may have with respect to any legislative changes that may be needed or desirable.

(5)(a) The air pollution variance board shall have the power to:

(b) Hold public hearings, conduct investigations, compel the attendance of witnesses, receive such pertinent and relevant proof and other things as it may deem to be necessary, proper, or desirable in order that it may effectively discharge its duties and responsibilities under this act.

*(c) Designate a hearing officer to conduct hearings on violations of this act and on requests for variances as provided for in section 66-24-11 of this act, which officer shall have power to issue notices of hearings, issue subpoenas requiring the attendance of witnesses and the production of such evidence, administer oaths, and take such testimony as may be necessary or in conformity with article 16 of chapter 3, C.R.S. 1963, and section 66-24-12 of this act; and such hearing officer shall certify and file with the air pollution variance board for adoption, modification, or rejection by said variance board such hearing officer's recommended findings, con-

clusions, and proposed orders, and shall cause to be sent to each party to such hearing a copy of such findings, conclusions, and proposed orders. Such hearing officer shall also certify and file with the air pollution variance board a copy of the full and complete record of all proceedings and testimony taken before him. If any scheduled hearing concerning violations of this act or requests for variances is attended by less than five members of the air pollution variance board and if the party whose case is to be heard agrees, such members as do attend shall constitute a hearing board for such hearing with the same powers and duties as specified for a hearing officer by this section.

*(d) Adopt, modify, or reject the findings, conclusions, and proposed orders of any hearing officer designated under paragraph (c) of this subsection concerning violations or requests for variances under this act. If such action by the air pollution variance board results in a finding of a violation or the denial of a requested variance in whole or in part, the party whose case has been heard may, within ten days after written notification of such action, file a written request for a hearing before the air pollution variance board, and such hearing shall thereupon be held by the air pollution variance board in accordance with section 66-29-12 of this act.

66-29-8

Section 8. — POWERS AND DUTIES OF THE DIVISION. — (1)(a) In addition to duties specified elsewhere in this act, the division shall have the duty to:

(b) Determine, by means of field studies and air monitoring and sampling, if the ambient air standards are being violated in any area of the state.

(c) Designate by legal description the area or areas of the state in which the emission standards set forth in section 5 of this act shall be in effect. Each area so designated shall consist of an area in which air pollution results in the ambient air standards set forth in section 4 of this act not being met and also areas adjacent thereto from which air contamination does or is likely to contribute to such air pollution. The determinations as to such adjacent areas shall be based upon meteorological and topographical considerations.

(d) On or before December 1 of each year report to the members of the general assembly on the effectivenss of the provisions of this act in carrying out the legislative intent as declared in section 2 of this act, and include in such report such recommendations at it may have with respect to any legislative changes that may be needed or desirable, including changes in standards.

*(e) Plan an air pollution control program for each area of the state and confer, review, and coordinate with each local air pollution control authority as required by section 6 (6).

(2)(a) In addition to authority specified elsewhere in this act, the division shall have the power to:

(b) Conduct or cause to be conducted studies and research with respect to air pollution and the control, abatement, or prevention thereof.

(c) Designate one or more persons or agencies in any area of the state as an air pollution control authority and as agent of the division to exercise and perform such powers and duties of the division as may be specified in such designation.

(d) Enter and inspect any property, premise, or place for the purpose of investigating either an actual or a suspected source of air pollution or air contamination or ascertaining compliance or noncompliance with any emission standard or any order under this act. Any information relating to secret process, or methods of manufacture, or production obtained in the course of the inspection or investigation shall be kept confidential. If samples of air or air contaminants are taken for analysis, a duplicate of the analytical report shall be furnished promptly to the person who is suspected of causing such air pollution or air contamination.

(e) Provide advisory technical consultation services to local communities.

(f) Inform the appropriate governmental agency of the results of atmospheric tests conducted in its jurisdiction and notify the city, town, county, or city and county affected whenever tests establish that the ambient air or a source or sources of emission of smoke or air contaminant fail to meet the standards established by this act. From time to time after the local agency has been so notified, the division shall report and make available to the public such results, notices to local agencies, and any progress made by the local agency following such notices.

(g) Furnish such personnel to the air pollution variance board as the air pollution variance board may reasonably require to carry out its duties and responsibilities under this act.

(h) Serve as the state agency for the receipt of moneys from the federal government or other public or private agencies with respect to air pollution control activities.

(i) Certify, qualify, or otherwise designate to any other agency or department of the government of this state or of any other state or of the federal government that any facility, land, building, machinery or equipment, or any part thereof, has been constructed, erected, installed, or acquired in conformity with the requirements of this state or of this act for control of air pollution or in conformity with the requirements for control of air pollution of any other state or the federal government.

(3) In the performance of its duties and in the exercise of its powers as set forth in this act the division shall be subject to the supervision of the state board of health.

66-29-9

Section 9. — TEMPORARY ORDERS PROHIBITING AIR POLLUTION OF IMMEDIATE DANGER TO PUBLIC HEALTH. — Whenever the division shall determine, after investigation, that any person is discharging or causing to be discharged into the atmosphere directly or indirectly any air contaminant which constitutes a clear, present, and immediate danger to the health of the public, the division shall issue its writen order to said person that he must discontinue immediately the discharge of such contaminant into the atmosphere and whereupon such person shall immediately discontinue such discharge. If such person, notwithstanding such order, continues the discharge of such contaminants into the atmosphere, the division is authorized to apply to any district court of this state for the district in which the said discharge is occurring for a temporary restraining order, temporary injunction, or permanent injunction as provided for in the Colorado rules of civil procedure. Such action in such district court shall be given precedence over all other matters pending in such district court.

The institution of such injunction proceedings by the division shall confer upon said district court exclusive jurisdiction to determine finally the subject matter of the proceeding.

66-29-10

Section 10. — ENFORCEMENT. — (1) The division shall enforce compliance with the provisions of section 5 of this act.

*(2) In case any written and verified compliant shall be filed with the division alleging that, or in case the division itself shall have cause to believe that, any person is violating any emission standard under this act, the division shall cause a prompt investigation thereof to be made, and if the person who makes such investigation on behalf of the division shall find after such investigation that a violation of any such standard exists, he shall promptly notify the director of the division then, by conference, conciliation, and persuasion, the division shall endeavor to eliminate the source or cause of the air pollution or air contamination which resulted in such violation.

(3) In case of failure by conference, conciliation, or persuasion, to correct or remedy such violation, the division shall cause to be issued and served upon the person allegedly violating any such standard a written order which shall specify the provision of the emission standards of which such person is said to be in violation and a statement of the manner in which such person is said to violate it and such order shall require the person so complained against to cease and desist from such violation within such reasonable time as the division may determine.

(4) Within ten days after receipt of such order the

recipient thereof may file with the air pollution variance board a written request for a hearing as to whether or not such violation exists or for a variance, or both. Upon the filing of such a request the order complained of shall be stayed pending the air pollution variance board's final determination thereon. In the event the determination pertains solely to the question of whether or not a violation exists, the order shall be stayed an additional thirty days within which the recipient may file a written request for a variance.

66-29-11

Section 11. — VARIANCES. — (1) The air pollution variance board may grant a variance, suspending or modifying the enforcement of any emission standard, or any rule, regulation, or enforcement order issued pursuant to this act against any person, whenever the said variance board shall determine that such variance would be consistent with and aid in implementing the legislative policy as set forth in section 2 of this act.

(2) The air pollution variance board shall grant a variance suspending or modifying the enforcement of any emission standard, or any rule, regulation, or enforcement order issued pursuant to this act against any person, whenever the said variance board shall determine that strict compliance with any provision of, or order issued pursuant to, this act would result in an arbitrary and unreasonable taking of property or in the practical closing of any lawful business or activity and such would be without sufficient corresponding public benefit.

*(3) The variance shall be granted, terminated, or modified by the air pollution variance board only after a

hearing before it or a hearing officer held pursuant to the provisions of this act. A variance may be granted with respect to any existing or proposed facility, process, or activity, regardless of whether the same is located within or outside of any designated area of the state. Hearings may be requested either by the air pollution variance board, the division, or by any person applying for or having received such a variance.

(4) Any variance granted pursuant to the provisions of this act shall be granted for such period of time and under such conditions as shall be specified by the air pollution variance board. The failure to meet any condition of the variance without prior written permission of the said variance board shall render such variance null and void. The air pollution variance board shall review, at least annually, any variance that has been granted to determine whether the terms and conditions of said variance have been complied with, and whether the continuance of the variance is justified.

66-29-12

*Section 12. — HEARINGS — GENERAL PROVISIONS. — (1) Not less than fifteen days after a hearing has been requested pursuant to section 11 (3) or section 7 (5) (d) of this act, the air pollution variance board shall grant such request and set a time and place therefor. Every such hearing shall be conducted pursuant to the provisions of this act and the provisions of article 16 of chapter 3, C.R.S. 1963.

(2) The division may appear as a party in any hearing before the air pollution variance board and shall have the same rights to judicial review as any other party.

(3) All testimony taken at any such hearing before the air pollution variance board or its hearing officer designated and acting under section 7 (5) (c) shall be under oath or affirmation. A full and complete record of all proceedings and testimony presented shall be taken and filed. The stenographer shall furnish, upon payment and receipt of any fees allowed therefor, a certified transcript of the whole or any part of his record to any party in such hearing requesting the same.

(4) Any information relating to secret processes, methods of manufacture, or production, which may be required, ascertained, or discovered shall not be publicly disclosed in public hearings or otherwise, and shall be kept confidential by any member, officer, or employee of the air pollution variance board or the division.

(5) At any hearings, opportunity to be heard with respect to the subject thereof shall be given to the public to the extent deemed reasonable and proper by the air pollution variance board.

(6) After due consideration of the written and oral statements, the testimony, and the arguments presented at any such hearing, the air pollution variance board shall enter its findings and final order, or make such final determination of the matter as it shall deem appropriate.

(7) In all proceedings before the air pollution variance board with respect to any alleged violation of any emission standard or order, the burden of proof shall be upon the division.

66-29-13

Section 13. — JUDICIAL REVIEW. — (1) Any

final order or determination by the air pollution variance board (including any final action taken with respect to an application for a variance as provided in this act) shall be subject to judicial review in accordance with the provisions of this act and the provisions of article 16 of chapter 3, C.R.S. 1963.

(2) Any party may move the court to remand the cease to the air pollution variance board, in the interests of justice, for the purpose of adducing additional specified and material evidence, and findings thereon; provided, that such party shall show reasonable grounds for the failure to adduce such evidence previously before the said variance board.

(3) Any proceeding for judicial review of any final order or determination of the air pollution variance board shall be filed in the district court for the district in which is located the air contamination source affected and shall be filed within twenty days after the date of said final order or determination.

66-29-14

Sections 14. — INJUNCTIONS. — In the event any person fails to comply with a cease and desist order that is not subject to a stay pending administrative review, the division may request the district attorney for the district in which the alleged violation exists or the attorney general to bring, and if so reqeusted it shall be his duty to bring, a suit for an injunction to prevent any further or continued violation of such order. In any such suit any finding of the air polution variance board shall be prima facie evidence of the fact or facts found therein. An injunction proceeding may be consolidated with judicial review of any final order or determination of the air pollution variance board.

66-29-15

Section 15. — PENALTIES. — (1) Subject to such variances as may be issued pursuant to this act, any person who in any designated area of the state shall violate any of the emission standards specified in this act and effective in such area, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars. Each day during which such a violation occurs shall constitute a separate offense.

(2) Subject to such variances as may be issued pursuant to a local air pollution law, any person who shall violate any emission standard specified in any local air pollution law, within the jurisdiction of the local governmental unit, enacting the same, shall be guilty of a misdemeanor and, upon conviction therof, shall be punished by a fine of not more than one hundred dollars. Each day during which such a violation occurs shall constitute a separate offense.

(3) No person shall be prosecuted pursuant to both subsections (1) and (2) of this section for the same activity.

(4) For all purposes of either subsection (1) or (2) of this section, each facility, process, and activity that is a source of air contamination shall be deemed to be in full compliance with the emission standards specified either in this act or in any local air pollution law unless and until a cease and desist order, issued with respect to such facility, process, or activity pursuant to this act or such local air pollution law, has become final by exhaustion of all rights, to administrative and judicial review, including any variance proceedings. Thereafter, the provisions of this sub-

section shall not be applicable to such facility, process, or activity.

*(5) Any person who violates section 5 (4) of this act by burning or permitting any burning without first having obtained a permit as required, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than one hundred dollars. Each day during which such a violation occurs shall constitute a separate offense.

66-29-16

Section 16. — APPLICATION OF ACT. — (1) The basis for proceedings or other actions that shall result from violations of any standard inure solely to and shall be for the benefit of the people of the state generally and it is not intended to create in any way new or enlarged private rights or to enlarge existing private rights, or to diminish private rights.

(2) A determination that air pollution or air contamination exists or that any standard has been disregarded or violated, whether or not a proceeding or action may be brought by the state, shall not create by reason thereof any presumption of law or finding of fact which shall inure to or be for the benefit of any person other than the state.

(3) The provisions of this act shall not apply to air pollution insofar as such pollution exists within the confines of particular commercial or industrial plant, works, or shop which is the source of such pollution and also shall not apply or affect the relations between employers and employees with respect to or arising out of any condition of air pollution.

(4) It is the purpose of this act to provide additional and cumulative remedies to prevent and abate air pollution and air contamination. Nothing in this act contained shall abridge or alter rights of action or remedies now or hereafter existing, nor shall any provision of this act or anything done by virtue of this act be construed as estopping individuals, cities, towns, counties, cities and counties, or the state or duly constituted political subdivisions thereof from the exercise of their respective rights to suppress nuisances.

Section 17. 66-2-6(2) and (12), Colorado Revised Statutes 1963 as amended by senate bill no. 2 enacted by the forty-fifth general assembly and approved by the governor, is hereby amended to read:

66-2-6. — POWERS AND DUTIES OF HEALTH DEPARTMENTS. — (2) To administer and enforce the laws pertaining to public health and vital statistics, and water pollution control, and the orders, rules, regulations, and standards of the state board of health and the state water pollution control commission, and to enforce the orders of the division of administration of the state department of public health with respect to air pollution control.

(12) To cooperate with the state department of public health and the state board of health in all matters pertaining to the public health, with the state water pollution control commission in all matters pertaining to water pollution control, and with the air pollution variance board and the division of administration of the state department of public health in all matters pertaining to air pollution.

Section 18. — SEVERABILITY CLAUSE. — If any

provision of this act or the application thereof to any person or circumstances, is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Section 19. — REPEAL. — Article 24 of chapter 66, Colorado Revised Statutes 1963, and chapter 58, Session Laws of Colorado 1964, are hereby repealed.

Section 20. — APPROPRIATION. — There is hereby appropriated, out of any moneys in the state treasury not otherwise appropriated, to the state department of public health, the sum of fifty thousand dollars ($50,000) or so much thereof as may be necessary, for the administration and enforcement of this act. Said appropriation shall be in addition to any other appropriation made to the department for such purpose, and shall become available on the effective date of this act and remain available until June 30, 1967.

Section 21. — SAFETY CLAUSE. — The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

APPENDIX E

BEFORE AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO

IN THE MATTER OF THE REQUEST OF WESTERN ALFALFA CORPORATION FOR A VARIANCE FROM THE EMISSION STANDARDS OF THE AIR POLLUTION CONTROL ACT OF 1966, AS AMENDED.	FINDINGS THE FACT, CONCLUSIONS OF LAW, AND DECISION.

THE MATTER of the request of the Western Alfalfa Corporation (hereinafter referred to as the Petitioner), for a variance from the emission standards of the Air Pollution Control Act of 1966, as amended, at its alfalfa dehydrating plants located at or near the towns of Eaton, Windsor, and Berthoud, Colorado, came on for hearing before the Air Pollution Variance Board of the State of Colorado, in Room 412, Colorado Department of Health Building, 4210 East 11th Avenue, Denver, Colorado, at 2:30 o'clock p.m., on September 11, 1969, and at 1:30 o'clock p.m., on October 16, 1969. At the hearing on September 11, 1969, David Foster, Esquire, was present and represented the Colorado Health Department and the Board, and Mr. George D. Blackwood, Jr., Attorney at Law, Union National Bank Building, 900 Walnut Street, Kansas City, Missouri 64106, and Mr. Donald D. Cawelti, Attorney at Law, Public Service Company Building, 550 15th Street, Denver, Colorado 80202, were present and represented the Petitioner. At the hearing on October 16, 1969 Mr. James Kreutz, Assistant Attorney General of

the State of Colorado, was present and represented the Board; David Foster, Esquire, was present and represented the Colorado Health Department; and Mr. Donald D. Cawelti, Attorney at Law, Public Service Company Building, 550 15th Street, Denver, Colorado 80202, was present and represented the Petitioner. From the evidence and matters submitted at the hearings, the Board finds as follows:

FINDINGS OF FACT

1. That the Petitioner's operations are in violation of the emission standards of the Air Pollution Control Act of 1966, as set out in Section 66-29-5, C.R.S. 1963 (1967 Perm. Cum. Supp.).

2. That Ringelmann and Opacity readings for a period in excess of three minutes were taken by personnel of the Colorado Department of Health on June 4, 1969, and all of such readings were in excess of a Ringelmann 2 and an Opacity of 40%.

3. That representatives of the Division have been in conference and conciliation with the Petitioner in regard to its air pollution violations since September, 1967.

4. That Petitioner was issued a Cease and Desist Order on June 16, 1969.

5. That Petitioner requested a hearing before this Board to determine if its operations were in violation of the emission standards set out above and if that finding was in the affirmative, for a variance from said standards.

6. That Petitioner performed a test pursuant to

Section 66-29-5(2)(e), Chapter 168, Colorado Session Laws 1969, but the Board finds that Petitioner did not comply with the statute in performing said test in that (a) the method of testing was not acceptable to the Division, and (b) the Division did not determine that it was a reasonable correlation between the standards set forth in subsections (2) and (3) when applied to the Petitioner's emissions.

7. That Petitioner does not have a permit or variance from this Board, the Division, or any local authority to conduct its operations, in violation of the Air Pollution Control Act of 1966, as amended.

8. That there are commercial businesses and residences within 10 block of Petitioner's Windsor Plant operations, ½ mile of Petitioner's Eaton Plant operations, and ¼ mile of Petitioner's Berthoud Plant operations.

9. That Petitioner's operations are within an air pollution area properly designated by the Division, pursuant to the Air Pollution Control Act of 1966, as amended.

CONCLUSIONS OF LAW

1. The Board finds as a matter of law that the Petitioner did not conduct the testing of its emissions in compliance with Section 66-29-5(2)(e), Chapter 168, Colorado Session Laws 1969, and that "reasonable correlation" means approximate equivalency.

2. The Board finds as a matter of law that Petitioner's emissions are of an opacity darker in shade than that permitted by law.

3. The Air Pollution Variance Board is granted authority under the Air Pollution Control Act of 1966, as amended, as set out in Sections 66-29-10 and 11, C.R.S. 1963 (1967 Perm. Cum. Supp.), to hold hearings and grant variances.

4. The Board finds that the legislative declaration set out in Section 66-29-2, C.R.S. 1963 (1967 Perm. Cum. Supp.), would not be complied with if the Petitioner were granted a variance.

DECISION

WHEREFORE, it is the decision of the Air Pollution Variance Board of the State of Colorado that the Petitioner's operations are in violation of the emission standards of the Air Pollution Control of 1966, as amended, and that Petitioner be and hereby is denied a variance from said emission standards.

This is a final order of the Air Pollution Variance Board and is subject to judicial review as set out in Section 66-29-13, C.R.S. 1963 (1967 Perm. Cum. Supp.).

DONE this 31 day of January, 1970.

AIR POLLUTION VARIANCE
BOARD OF THE STATE
OF COLORADO
By GEORGE J. DWIRE,
Chairman

APPENDIX F

IN THE DISTRICT COURT IN AND FOR THE COUNTY OF WELD AND THE STATE OF COLORADO

Civil Action No. 19974

WESTERN ALFALFA CORPORATION,
a Kansas corporation,

Petitioner,

vs.

AIR POLLUTION VARIANCE BOARD OF THE STATE OF COLORADO,

Respondent.

AMENDED FINDINGS AND JUDGEMENT

THIS MATTER coming on for hearing on the Amended Complaint for review pursuant to Chapter 66, Article 29, Section 13, 1963 C.R.S., amended, for declaratory relief against a ruling of the Air Pollution Variance Board of the State of Colorado; the Petitioner appearing in Court by and through Donald D. Cawelti, Esq., S. Robert Houtchens, Esq., and George D. Blackwood, Jr. Esq., its attorneys; the Respondent appearing in Court by and through David Foster, Esq., and William Tucker, Esq., its attorneys; and the Court having reviewed the proceedings before the Air Pollution Variance Board and having heard the testimony of witnesses and the arguments of counsel, and a motion having been made for permission to file briefs in relation to the issues herein, and the Court granting such motion did continue the matter pending filing of written arguments and supporting briefs; and the Court having considered the testimony

elicited at the hearing, and arguments of counsel and supporting briefs, did on July 28, 171 enter its Findings and Judgment. Thereafter, Petioner timely filed a Motion for Amendment of Findings and Judgment, which motion was argued to the Court on November 11, 1971. The Court has determined that its Findings and Order dated July 28, 1971 should be amended and clarified and accordingly hereby enters the following findings, conclusions and order:

THE COURT FINDS

That the hearing conducted by the Air Pollution Variance Board of September 11, 1969 and October 16, 1969 was concerned only with the question of an alleged violation by Petitioner of The Air Pollution Control Act of 1969, as amended, and the resulting Cease and Desist Order promulgated by the Division of Administration of the State Department of Public Health.

THE COURT FURTHER FINDS that one of the questions at issue at the hearing before this Court concerned whether or not Petitioner was denied due process of law and equal protection of the law contrary to the 14th Amendment of the Constitution of the United States and Section 25, Article 2 of the Constitution of the State of Colorado by the acts of the Respondent herein by the use of the Ringelmann Chart as provided in Chapter 66, Section 29, Article 5 (2), C.R.S., 1963, as amended in 1967, and the Court finds against the Petitioneer herein and for the Respondent and holds that the use of the Ringelmann Chart for measurement of opacity is not constitutional.

THE COURT FURTHER FINDS, however, that while the Ringelmann Chart test is a good and sufficient basis to institute proceedings or a hearing before the Air Pollu-

tion Variance Board, it is evident by the testimony, both before the Board and this Court, that it is not the only test relating to matters set forth in The Air Pollution Control Act concerning violations thereof and that careful consideration should be undertaken by the Board if there is presented to them evidence resulting from a more precise test of the pollutant emissions. It is noted by the Court that in Respondent's brief that the Petitioner's act of retaining an engineering firm, to wit: Stearns-Roger, to conduct a particulate study of the emissions from its plant in July, 1969 was objected to for the reason it was done without notification to the Department of Health of such test, thus resulting in the Department not having present personnel to determine if the method was acceptable. If this be objectionable, then it is likewise objectionable if the Department of Health makes its examination of opacity and pollutants without the presence of personnel of the person or company being eamined for possible violation of The Air Pollution Control Act.

THE COURT FURTHER FINDS that the State Department of Health limits the certification of experts in the use of the Ringelmann readings concerning opacity to persons employed by the State, thus precluding possible challenge of the methods employed in obtaining the readings of the Ringelman Chart and challenging any finding made by the so-called certified experts at the time of examination.

THE COURT FURTHER FINDS that in the conduct of the hearing before the Variance Board that it appeared to be incumbent upon the Respondent to the Cease and Desist Order to be burdened by presenting a preponderance of evidence to show that it was not in violation of The Air Pollution Control act rather than, as should have been

the case, with the State carrying the burden of proof proving that the Respondent was guilty of such violation, accordingly.

THE COURT CONCLUDES:

1. That the hearing afforded Petitioner by the Air Pollution Variance Board lacked those fundamental elements required by due process of law and the well developed standards of fairness which are expected in proceedings involving the serious consequence sought by Respondent.

2.. Petitioner was foreclosed from presenting any evidence on its behalf since the observations of the State expert were made in secret without Petitioner being advised of his presence until the Cease and Desist Order was issued some twelve days later.

3. The refusal of the Division of Administration of the State Department of Health to certify as smoke reading experts those persons attending its smoke reading training school who are not public employees precludes those accused of pollution from presenting expert testimony which will be received and considered by the Variance Board which action is offensive to this Court's sense of fairness.

4. The Variance Board erred in considering only evidence of Ringelmann observations and in not considering more scientific test made or which could have been made, particularly considering the fact that the emission here in question is largely mixed with steam, a nonpollutant. In this situation the Ringelman observations are particularly

suspect and the Variance Board should require more substantial evidence.

5. The finding of the violation by the Variance Board was not supported by substantial evidence but was based only upon an uncorroborated testimony of approixmately 10 minutes observation by one witness, and Petitioner was afforded no opportunity whatsoever to present any evidence to the contrary.

THEREFORE, THE COURT ORDERS that the decision of the Air Pollution Variance Board be set aside, and any further proceedings before said Board be conducted in accordance with this opinion.

Done in Chambers this 18 day of November, 1971.

BY THE COURT:

DONALD A. CARPENTER
Judge